STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL CLUM,

Plaintiff-Appellee,

v

JACKSON NATIONAL LIFE INSURANCE COMPANY,

Defendant-Appellant,

and

VINCE VILONA,

Defendant.

UNPUBLISHED
November 5, 2013

No. 307357
Ingham Circuit Court
LC No. 10-000146-CL

Before: OWENS, P.J., and GLEICHER and STEPHENS, JJ.

PER CURIAM.

Plaintiff Michael Clum argued before a jury that defendant Jackson National Life Insurance Company (JNL) wrongfully terminated his employment because he is Caucasian and not because he violated a company policy against violence in the workplace as claimed by the employer. The jury found credible Clum's evidence that his team leader presented a false report to upper management out of fear that his African-American coworker, James DeMyers, would raise a complaint of racism against him. Contrary to JNL's appellate challenges, such "cat's-paw" evidence is admissible as indirect evidence that an employer's termination decision was motivated, at least in part, by race. Clum presented sufficient admissible evidence to create a prima facie case of wrongful employment discrimination and we will not interfere with the jury's ruling in his favor. We affirm.

I. BACKGROUND

Clum, who is Caucasian, and DeMyers, who is African-American, worked together for several years in the maintenance department at the JNL building in Okemos. The two men never got along. On October 21, 2009, DeMyers was called to rectify a power outage in another part of the building and therefore did not complete an earlier assigned task of setting up a conference room for a yoga class. Clum and Thomas Biegaj, a Caucasian temporary contractor, agreed to assist when asked by the yoga instructor. Clum retrieved a pull cart from the building's boiler

room. DeMyers intended to use the cart that day and had earlier loaded it with tools and two chairs. DeMyers claimed that Clum threw the items off the cart, but Clum asserted that he simply placed them on the floor. After setting up the conference room, Biegaj returned the cart to the boiler room. Later that afternoon, DeMyers stormed into the maintenance department office and demanded, "Who's been messing with my cart?" Clum stated that he had used the cart. DeMyers, still angry, left the room.

The next morning, Clum and Biegaj sat in the maintenance office eating breakfast. Their coworker, Thomas DeWitt, and the maintenance team leader, Mark Middaugh, were also in the room. DeMyers entered, and he and Clum "stared each other down." DeMyers approached Clum, who was sitting at a desk, and hovered above him. DeMyers aggressively asked, "You got a problem?" Clum calmly responded, "No. Do you have a problem?" DeMyers contended that Clum then said in a soft voice, "You want to take it outside?" Middaugh supported DeMyers' version of events. Clum and Biegaj, on the other hand, denied that Clum made this statement. DeWitt, tired of the tension between DeMyers and Clum, purposefully tuned out the conversation and did not know what either man said. DeMyers turned and left the office, while Clum remained seated at his desk. All the witnesses to this incident were Caucasian.

Later that day, DeMyers asked Middaugh to report the incident to management. Under the JNL chain of authority, Middaugh reported to facilities manager Vince Vilona. Vilona, in turn, reported to Tim Dooling, director of facilities. Both men are Caucasian. Although Middaugh agreed that the situation was serious, he failed to immediately report it. After DeMyers "pushed" him, Middaugh orally reported the incident to Vilona and Dooling about two weeks later. In the meantime, Clum had contacted Vilona to request a meeting to discuss the incident. Vilona postponed the meeting and it never took place. Vilona asked Middaugh to prepare a written statement and claimed that he did not ask nor expect Middaugh to investigate the incident first. Middaugh responded with the following email on November 5, 2009:

> I checked all my paperwork and found out that the date was wed. [sic] October 21. It was also the day that we had a power outage, that is why [DeMyers] and [] DeWitt had went over to check out RDC1A & B. [DeMyers] was the "Maintenance Radio Person" of the day, so his responsibilities for that day included completing the conference room set-ups. The power outage happened around 11:00 am. [DeMyers] was responsible for the Yoga set up which is right around that time. But since he was over at RDC he wasn't able to take care of it. When [DeMyers] did come back to do the setup [] Clum gave him a hard time about it. And he also gave him a hard time about throwing a chair off the cart that was being used.
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> The following morning when [DeMyers] came in [Clum] gave him a hard stairdown [sic] and asked if he wanted to step outside and take care of this. [] Clum, [] Beigaj [sic], [] Dewitt [sic], and [] Demyers [sic] were all in the office to hear this. [DeMyers] walked out of the office.

Vilona and Dooling reported the incident to Bruce Raak, director of JNL's Human Resources department. Dooling interviewed DeWitt and shared with Raak that DeWitt had tuned out the conversation before the alleged threat would have been made. Raak interviewed

Clum, DeMyers, and Middaugh. Raak's notes indicated that according to Middaugh, after DeMyers left the office on October 22, Clum said to Middaugh, "You need to do something about your boy," and that Clum denied making such a comment. All three managers testified that they purposely decided not to interview Biegaj because he was a contract employee, he and Clum were close friends, and he was involved in the instigating event—the removal of DeMyers' items from the pull cart. Therefore, the managers believed Biegaj would present a biased version of events.

On November 10, after DeMyers had requested a meeting with Raak to determine why his complaint had yet to be resolved, Vilona, Dooling and Raak decided to terminate Clum's employment. Clum's termination was based on his violation of the following JNL employee handbook provision:

> The Company is opposed to and will not tolerate violence, intimidation, or threatening behavior in any way. Engaging in such conduct on Company premises, during working hours, or at Company-sponsored events including verbal threats of any nature, the use of "fighting words," or the use of abusive or profane language which tends to threaten, intimidate, coerce or interfere with other associates, supervisors, vendors or customers will result in corrective action, up to—and including—immediate termination.

Although not required by the handbook, the trio decided that termination was the only option given the severity of the incident. They also demoted Middaugh from the team leader position for his delay in reporting the incident.

Thereafter, Clum filed suit for wrongful termination in violation of the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq.*, alleging simply that "race was a substantial factor in Defendant's decision to discharge Plaintiff." As the case proceeded, Clum averred that JNL was overly sensitive to race issues and therefore treated DeMyers preferentially even though he had engaged in threatening conduct toward Clum. To corroborate his theory, Clum argued that JNL terminated another employee, Robert Chrisman, in 2004, after making what Clum describes as a civil-rights supportive comment. Chrisman and DeMyers were pulled over by a police officer while travelling together in a work vehicle. The officer issued a ticket to Chrisman for not wearing a seatbelt. Chrisman told various coworkers that they were likely pulled over because DeMyers is African-American. Clum contended that Chrisman's statement was an innocuous comment regarding improper police profiling. DeMyers took offense and reported Chrisman to upper management, resulting in Chrisman's termination.

Following the Chrisman incident, Middaugh repeatedly told his coworkers that DeMyers "liked to play the race card." Clum theorized that Middaugh purposefully presented a skewed and inaccurate report to upper management because he was afraid his failure to support DeMyers would result in DeMyers using "the race card" against him as well. Clum indicated that Middaugh twice told him after his termination that JNL terminated him because he was white

and DeMyers was black.[1] Clum claimed that Middaugh stated over the phone the day after his termination, "I was fired because I was white and [] DeMyers was black and [] DeMyers would use the race card against me." One week later, Clum, Biegaj and Middaugh met for lunch, Clum asked why he was terminated, and Middaugh repeated his statement.

As evidence that JNL also gave DeMyers preferential treatment, Clum also cited a 2007 incident in which DeMyers threatened him with violence. DeMyers and Clum were both in the maintenance department office with their former coworker, Bud Clark. Clark had the flu and was coughing. DeMyers rudely confronted Clark about his coughing and Clum intervened. DeMyers allegedly told Clum, "any time that I wanted to get froggy, to let him know." Later Internet research informed Clum that DeMyers had invited him to fight.[2] Clum reported the incident to Dooling and yet no investigation was ever conducted. Dooling later testified that DeMyers denied making any threat and indicated that he felt further investigation was unnecessary because of the lack of witnesses and because Clum did not actually feel threatened. Neither Dooling nor Clum brought the matter to Raak's attention.

Clum claimed that he had more seniority and a better work record than DeMyers. Specifically, Clum had not received a final written warning since early in his employment while DeMyers was chronically tardy and did not always respond when called to handle a problem. Despite repeated written warnings, JNL had not terminated DeMyers' employment.

JNL sought summary disposition of Clum's claim, but the circuit court denied the motion and the case proceeded to trial.[3] A jury trial conducted in the summer of 2011 resulted in a hung jury and ultimately a mistrial. A new trial was conducted that fall. At the close of Clum's case-in-chief in both trials, JNL sought a directed verdict, which the circuit court denied each time.[4] The jury ultimately ruled in Clum's favor and awarded him over $1 million in damages.

On appeal, JNL challenges the court's failure to enter a judgment in its favor, the admission of certain evidence and the circuit court's provision of certain special jury

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[1] Before trial, JNL filed a motion in limine to preclude evidence that Middaugh made this statement to Clum. The circuit court denied the motion and this Court denied JNL's interlocutory application for leave to appeal that order. *Clum v Jackson Nat'l Life Ins Co*, unpublished order of the Court of Appeals, entered June 17, 2011 (Docket No. 304405).

[2] "Froggy" has several alternate definitions, including being prepared to fight. See <http://www.urbandictionary.com/define.php?term=froggy> (accessed October 15, 2013).

[3] JNL filed an interlocutory application for leave to appeal the denial of its summary disposition motion, which this Court denied. *Clum v Jackson Nat'l Life Ins Co*, unpublished order of the Court of Appeals, entered June 7, 2011 (Docket No. 302280).

[4] During the first trial, JNL filed an interlocutory application for leave to appeal the circuit court's denial of its directed verdict motion, which this Court also denied. *Clum v Jackson Nat'l Life Ins Co*, unpublished order of the Court of Appeals, entered October 7, 2011 (Docket No. 305861).

instructions. The majority of JNL's appellate claims revolve around its belief that it cannot be held liable for discrimination based on Middaugh's actions and comments even if Middaugh was motivated by race-based concerns to promote Clum's termination.

II. STANDARDS OF REVIEW

"A trial court's decision to admit or exclude evidence is reviewed for an abuse of discretion. An abuse of discretion occurs when the trial court chooses an outcome falling outside the range of principled outcomes." *Edry v Adelman*, 486 Mich 634, 639; 786 NW2d 567 (2010) (citations omitted). "When reviewing a trial court's decision to allow the jury to be presented with certain evidence, this Court will not assess the weight and value of the evidence, but will only determine whether the evidence was of such a nature that it could be properly considered by the jury." *Schanz v New Hampshire Ins Co*, 165 Mich App 395, 405; 418 NW2d 478 (1988).

We review de novo a claim of instructional error, "but the determination whether an instruction is accurate and applicable is reviewed for an abuse of discretion." *Freed v Salas*, 286 Mich App 300, 327; 780 NW2d 844 (2009). "'Jury instructions should include all the elements of the plaintiff's claims and should not omit material issues, defenses, or theories if the evidence supports them.'" *Id.*, quoting *Keywell & Rosenfeld v Bithell*, 254 Mich App 300, 339; 657 NW2d 759 (2002). "[W]e examine the jury instructions as a whole to determine whether there is error requiring reversal. . . . Even if somewhat imperfect, instructions do not create error requiring reversal if, on balance, the theories of the parties and the applicable law are adequately and fairly presented to the jury." *Case v Consumers Power Co*, 463 Mich 1, 6; 615 NW2d 17 (2000). Reversal is warranted only if the failure to do so is inconsistent with substantial justice. *Freed*, 286 Mich App at 327.

We also review de novo a trial court's actions on motions for directed verdict and summary disposition. *Krohn v Home-Owners Ins Co*, 490 Mich 145, 155; 802 NW2d 281 (2011) (directed verdict); *West v General Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003) (summary disposition). The question for either motion is whether the record before the trial court at the time the motion was decided, when viewed in the light most favorable to the nonmoving party, supports a decision that the movant was entitled to judgment as a matter of law. *Krohn*, 490 Mich at 155; *West*, 469 Mich at 183. If there remain any questions of material fact, the case must proceed to the jury and neither summary disposition nor directed verdict is appropriate. *West*, 469 Mich at 183; *Cacevic v Simplimatic Engineering Co*, 248 Mich App 670, 679-680; 645 NW2d 287 (2001).

III. EMPLOYMENT DISCRIMINATION

MCL 37.2202(1)(a) of the CRA prohibits discriminatory conduct on the part of employers. Under the statute, an employer must not:

> Fail or refuse to hire or recruit, discharge, or otherwise discriminate against an individual with respect to employment, compensation, or a term, condition, or privilege of employment, because of religion, race, color, national origin, age, sex, height, weight, or marital status.

To overcome a motion for summary disposition or directed verdict of a claim that a plaintiff's termination was based on racial animus, the plaintiff can present direct evidence, or present indirect evidence to create a prima facie case.

> In some discrimination cases, the plaintiff is able to produce direct evidence of racial bias. In such cases, the plaintiff can go forward and prove unlawful discrimination in the same manner as a plaintiff would prove any other civil case. For purposes of the analogous federal Civil Rights Act, the Sixth Circuit Court of Appeals has defined "direct evidence" as "evidence which, if believed, requires the conclusion that unlawful discrimination was at least a motivating factor in the employer's actions." [*Hazle v Ford Motor Co*, 464 Mich 456, 462; 628 NW2d 515 (2001) (citations omitted).]

"Direct evidence of disparate treatment would be evidence that, if believed, would prove the existence of the emphasis of the employer's illegal motive without benefit of presumption or inference." *Lytle v Malady*, 209 Mich App 179, 184; 530 NW2d 135 (1995) (*Lytle I*), rev'd in part on other grounds *Lytle v Malady (On Rehearing)*, 458 Mich 153; 579 NW2d 906 (1998) (*Lytle II*).

In the absence of direct evidence, the plaintiff must create a case as follows:

> In order to avoid summary disposition, the plaintiff must then proceed through the familiar steps set forth in *McDonnell Douglas* [*Corp v Green*, 411 US 792, 802-803; 93 S Ct 1817; 36 L Ed 2d 668 (1973)]. The *McDonnell Douglas* approach allows a plaintiff to present a rebuttable prima facie case on the basis of proofs from which a factfinder could infer that the plaintiff was the victim of unlawful discrimination. . . . [*Hazle*, 464 Mich at 462 (quotation marks omitted)]
>
> To establish a prima facie case of discrimination, plaintiff must prove by a preponderance of the evidence that (1) she was a member of the protected class; (2) she suffered an adverse employment action, in this case . . . discharge; (3) she was qualified for the position; but (4) she was discharged under circumstances that give rise to an inference of unlawful discrimination. [*Lytle II*, 458 Mich at 172-173.]

Our Supreme Court has alternatively described the fourth element as requiring proof that "others, similarly situated and outside the protected class, were unaffected by the employer's adverse conduct." *Town v Mich Bell Tel Co*, 455 Mich 688, 695; 568 NW2d 64 (1997).

"Once plaintiff has sufficiently established a prima facie case, a presumption of discrimination arises. The burden then shifts to the defendant to articulate a 'legitimate, nondiscriminatory reason' for plaintiff's termination to overcome and dispose of this presumption." *Lytle II*, 458 Mich at 173. The employer may not rest on the arguments of counsel but must produce evidence that its actions were based on a legitimate, nondiscriminatory reason. *Hazle*, 464 Mich at 464-465.

To overcome the defendant's presentation of "a legitimate, nondiscriminatory reason" for the plaintiff's termination, "the plaintiff must demonstrate that the evidence in the case, when

construed in the plaintiff's favor, is sufficient to permit a reasonable trier of fact to conclude that discrimination was a motivating factor for the adverse action taken by the employer toward the plaintiff." *Id.* at 465 (quotation marks and citation omitted). Once the trial court has conducted this burden-shifting analysis and decides to send the case to the jury, "'the only question the jury need answer [] is whether the plaintiff is a victim of intentional discrimination.'" *Id.* at 467, quoting *Gehring v Case Corp*, 43 F3d 340, 343 (CA 7, 1995).[5]

IV. "CAT'S-PAW" THEORY OF LIABILITY

Clum sought to hold JNL liable based on the comments and actions of Middaugh, a maintenance department team leader. Clum theorizes that Middaugh presented his version of events to Vilona and Dooling as if he witnessed the hostility on October 21, 2009 (which he did not) and lied to support DeMyers' contention that Clum had invited him to fight on October 22. Clum argues that Middaugh was motivated by race because he was afraid not to support DeMyers as DeMyers might have "played the race card" in retaliation against him. Middaugh was not part of the team that decided to terminate Clum's employment; only Raak, Vilona and Dooling made that decision. Yet, the managers conceded that Middaugh's report played an "important" role in their decision.

Imputing liability to a principal based on a non-decisionmaker's racial animus is colloquially referred to as the "cat's-paw" or "rubber stamp" doctrine. Under this doctrine, a plaintiff seeks "to hold his employer liable for the animus of a supervisor who was not charged with making the ultimate employment decision." *Staub v Proctor Hosp*, ___ US ___; 131 S Ct 1186, 1190; 179 L Ed 2d 144 (2011).[6] Based on tort and agency principles, *id.* at 1191-1192, *Staub* accepted the existence of such liability. The Court held, "When a decision to fire is made with no unlawful animus on the part of the firing agent, but partly on the basis of a report prompted (unbeknownst to that agent) by discrimination, discrimination might perhaps be called a 'factor' or a 'causal factor' in the decision." *Id.* at 1192.

Staub continued:

> Animus and responsibility for the adverse action can both be attributed to the earlier agent (here, Staub's supervisors) if the adverse action is the intended consequence of that agent's discriminatory conduct. So long as the agent intends,

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[5] "[F]ederal precedent, while not binding, is persuasive authority in interpreting and applying the [CRA]." *Lytle I*, 209 Mich App at 184. See also *Harrison v Olde Fin Corp*, 225 Mich App 601, 610; 572 NW2d 679 (1997).

[6] The plaintiff in *Staub*, an army reservist, filed suit against his employer for terminating his employment based on antimilitary animus in violation of the Uniform Service Employment and Reemployment Act, 38 USC 4301 *et seq*. The act prohibits an employer from terminating an individual's employment if the individual's military obligations are "a motivating factor in" the decision. 38 USC 4311(c).

> for discriminatory reasons, that the adverse action occur, he has the scienter required to be liable . . . . And it is axiomatic under tort law that the exercise of judgment by the decisionmaker does not prevent the earlier agent's action (and hence the earlier agent's discriminatory animus) from being the proximate cause of the harm. Proximate cause requires only "some direct relation between the injury asserted and the injurious conduct alleged," and excludes only those "link[s] that are too remote, purely contingent, or indirect." We do not think that the ultimate decisionmaker's exercise of judgment automatically renders the link to the supervisor's bias "remote" or "purely contingent." The decisionmaker's exercise of judgment is also a proximate cause of the employment decision, but it is common for injuries to have multiple proximate causes. [*Id.* (citations omitted).]

This approach makes sense, asserted the Supreme Court, because employers "often allocate[]" duties among its managers and therefore any employment decision will be based on assessments and reports of intermediate supervisors. No employer should be able to purposefully shield itself from liability by allocating its duties in this manner. *Id.* at 1192-1193. An employer's "independent investigation," which results in reasons beyond the discriminatory report to support the termination, can rehabilitate the employer's decision, however. *Id.* at 1193.

Staub concluded, "Since a supervisor is an agent of the employer, when he causes an adverse employment action the employer causes it; and when discrimination is a motivating factor in his doing so, it is a 'motivating factor in the employer's action.'" *Id.* Ultimately, "if a supervisor performs an act motivated by [discriminatory] animus that is intended by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable." *Id.* at 1194.

The Sixth Circuit Court of Appeals has weighed in on the cat's-paw doctrine numerous times. In *Ercegovich v Goodyear Tire & Rubber Co*, 154 F3d 344, 354-355 (CA 6, 1998), for example, the court found relevant to establishing discriminatory motive "remarks by those who did not independently have the authority or did not directly exercise their authority to fire the plaintiff, but who nevertheless played a meaningful role in the decision." The discriminatory remarks of an intermediate supervisor are also relevant to establish motive. *Id.* The existence "of a discriminatory atmosphere" in the workplace "tend[s] to add 'color' to the employer's decisionmaking processes and to the influences behind the actions taken with respect to the individual plaintiff." *Id.* at 356 (quotation marks and citation omitted).

V. CAT'S-PAW INSTRUCTION

At the second trial, Clum asked the court to give an instruction to the jury consistent with the cat's-paw theory of liability. Clum noted that, at the first trial, Middaugh had not acknowledged any inaccuracies in the report he had provided to Vilona and Dooling. At the second trial, however, Middaugh admitted that he had not witnessed the events on October 21 and yet his report was prepared as an eyewitness account. Middaugh's report inaccurately stated that Clum started the "stare down" with DeMyers and omitted that DeMyers approached Clum and said, "You got a problem." Clum asserted that JNL tried "to avoid any responsibility for Mr. Middaugh's conduct" at the second trial. Citing *Staub*, 131 S Ct 1186, Clum argued that it was

appropriate to instruct the jury that an employer could be held liable when the ultimate decisionmaker's resolution was "based on the discriminatory animus of an employee who influenced but did not make the ultimate employment decision."

After instructing the jury that it had to consider whether Clum and DeMyers were similarly situated, whether Clum had been treated more harshly, and whether that treatment was motivated at least in part by race, the court read the following instruction:

> If the jury believes that Plaintiff has proved that [] Middaugh was motivated by discriminatory bias and that Middaugh's bias was casually [sic] related to Plaintiff's discharge, then the jury may, but is not required to, draw the inference that Plaintiff's race was a factor which made a difference in Plaintiff's discharge.

We discern no reversible error in the presentation of this instruction. JNL makes much of the fact that "[n]o published Michigan case has accepted the cat's-paw theory." See *Dantzler v Elliott*, unpublished opinion per curiam of the Court of Appeals, issued December 15, 2011 (Docket No. 301141), unpub op at 2; *McQueen v Third Judicial Circuit Court*, unpublished opinion per curiam of the Court of Appeals, issued October 25, 2011 (Docket No. 299148), unpub op at 5. However, this Court has applied the cat's-paw theory in the past and our Supreme Court "at least nominally[] recognized" the concept in *Ramanathan v Wayne State Univ Bd of Governors*, 480 Mich 1090; 745 NW2d 115 (2008). See *Jenkins v Trinity Health Corp*, unpublished opinion per curiam of the Court of Appeals, issued July 28, 2009 (Docket No. 284659) (Talbot, J., concurring in part and dissenting in part), unpub op at 6-7 and n 5. And our Court employed the cat's-paw theory in a published opinion, although it failed to name the doctrine. *Harrison*, 225 Mich App 601 (in which racist remarks made by individuals involved in the interview process, but not tasked with the actual employment decision, were imputed to the decisionmaker himself).

JNL also contends that the cat's-paw doctrine cannot exist under Michigan law because our Supreme Court rejected the "aided-by-agency" standard in *Hamed v Wayne Co*, 490 Mich 1, 24; 803 NW2d 237 (2011), and *Zsigo v Hurley Med Ctr*, 475 Mich 215, 221-224; 716 NW2d 220 (2006). *Hamed* and *Zsigo* simply are not on point. In *Hamed* and *Zsigo*, the plaintiffs sought to hold an employer liable for a sexual assault perpetrated by an employee on a nonemployee. *Hamed*, 490 Mich at 6-7; *Zsigo*, 475 Mich at 218-219. As the subject employees were acting outside the scope of their employment when they committed their criminal acts, the employers would not be liable under the general rule of respondeat superior. *Hamed*, 490 Mich at 10-11; *Zsigo*, 475 Mich at 221. The question was whether Michigan courts recognized an exception to the nonliability rule "when the employee is aided in accomplishing the tort by the existence of the agency relation." *Zsigo*, 475 Mich at 217 (quotation marks omitted); see also *Hamed*, 490 Mich at 11.

The legal situation presented in the current case bears no resemblance to *Hamed* and *Zsigo*. Even if those cases were apposite, Middaugh was actually acting within the scope of his employment. Middaugh was "engaged in the service of his master, or while about his master's business." *Hamed*, 490 Mich at 11 (quotation marks omitted). Middaugh's supervisors at JNL asked him to prepare a report about the October 2009 incident and he did so. Neither *Hamed* nor

Zsigo speak to nor prevent the admission or consideration of Middaugh's statements outside that report when discerning Middaugh's personal bias in preparing it.

Moreover, the instruction, although it does not perfectly track the language of *Staub* and other cat's-paw cases, "adequately and fairly presented" the law to the jury. *Case*, 463 Mich at 6. As provided in *Staub*, 131 S Ct at 1192, the instruction guided the jury that Middaugh, although not the decisionmaker, may have had an impact on Clum's termination. The court should have instructed the jury that if JNL's investigation into the incident uncovered facts beyond Middaugh's biased report and JNL's employment decision was based instead on those neutral factors, Clum's termination would not violate the CRA. See *id.* at 1193. Given the admissions by the decisionmakers that Middaugh's report was a major factor in the decision to terminate Clum's employment, however, any error is harmless and reversal is not warranted.

JNL contends that the jury instructions further omitted reference to the element that the discrimination must be intentional. The court instructed the jury consistent with MI Civ JI 15.02, "The Plaintiff must prove that he was discriminated against because of race. The discrimination must have been intentional. It cannot have occurred by accident. Intentional discrimination means that one of the motives or reasons for Plaintiff's discharge was race." The court did not commit error simply by declining to repeat this element when instructing the jury on the cat's-paw theory of liability only a few moments later.

JNL also challenges the following instruction:

> If the jury believes that Plaintiff and [] DeMyers were similarly situated and that Plaintiff was treated more harshly than [] DeMyers for the same or similar conduct, then the jury may, but is not required to, draw the inference that Plaintiff's race was a factor which made a difference in Plaintiff's discharge.

JNL complains that this instruction is legally inaccurate because a jury must first and foremost determine whether Clum and DeMyers were similarly situated. The court's instruction does not eliminate that requirement, however. The court expressly instructed the jury that it could infer liability only if Clum and DeMyers were similarly situated. And in the subsequent paragraph, the court instructed the jury on the similarly-situated element.

JNL also complains that the cat's-paw instruction should not have been given because it was not factually supported by the record evidence. A court may not read an instruction to the jury if that instruction is not supported by the evidence. *Jaworski v Great Scott Supermarkets*, 403 Mich 689, 697; 272 NW2d 518 (1978). As noted later in this opinion, Clum presented sufficient evidence to support the presentation of this instruction. After all, "[e]ven scant evidence may support an instruction where it raises an issue for the jury's decision." *Klanseck v Anderson Sales & Serv, Inc*, 426 Mich 78, 91; 393 NW2d 356 (1986).

Finally, JNL complains that the "prejudice" caused by the cat's-paw instruction "was aggravated" by the court's rejection of two of its proposed special jury instructions. JNL asked the court to instruct the jury as follows: (1) "When deciding whether race was a factor that mattered in the decision to discharge the plaintiff, you must look to the intent of the persons who

actually made the decision to discharge and decide whether those persons acted with racial animus in making their decision"; and (2)

> When deciding whether race was a factor that mattered in [JNL's] decision to discharge the plaintiff, you must determine whether the decision-makers, at the time of their decision, held an honest belief that the plaintiff violated [JNL's] policy against threats in the workplace. Those decision-makers are deemed to have an honest belief in their reason for discharging [] Clum where they reasonably relied on the particularized facts that were before them at the time the decision was made, even if the particularized facts later turn out to be incorrect.

As the cat's-paw instruction was properly given, there was no "prejudice" to remedy. And the cat's-paw instruction did not mandate a particular result. The court clearly advised the jury that it could choose to infer discrimination from certain acts or it could disregard that evidence. Accordingly, even if the instruction was imperfect, it was not overly prejudicial. Moreover, the court accurately instructed the jury on the elements of an employment discrimination claim. Additional special instructions to explain those elements were unwarranted. "Supplemental instructions need not be given if they would add nothing to an otherwise balanced and fair jury charge nor enhance the ability of the jury to decide the case intelligently, fairly, and impartially." *Novi v Woodson*, 251 Mich App 614, 630; 651 NW2d 448 (2002). Viewing the jury instructions as a whole, we discern no error demanding relief.

VI. EVIDENTIARY ISSUES

Before the first trial, JNL objected to the admission of evidence regarding Chrisman's termination. JNL argued that the evidence was "irrelevant and would be unfairly prejudicial." Specifically, Chrisman was terminated for making a racially charged statement, not for threatening violence against DeMyers. Further, Chrisman never complained that he was terminated based on racial discrimination. JNL argued that admitting the evidence would result in a "trial within a trial" to determine whether Chrisman's termination was wrongful. The court admitted the evidence, ruling that "it [was] relevant to show perhaps a pattern or that [JNL] acted this way in the past based on [] DeMyers' complaint to management." The parties stipulated to accept the court's evidentiary ruling in the second trial rather than reargue the issue.

In a separate motion in limine before the first trial, JNL sought to preclude testimony that Middaugh informed Clum that he was terminated because he is white and DeMyers is black. JNL argued that the statements were irrelevant to determining JNL's motivation because Middaugh was not involved in the termination decision. JNL further contended that the statements were unduly prejudicial because the jury would likely conflate Middaugh's alleged statements with any intent held by Vilona, Dooling and Raak. The court found Middaugh's statements to be hearsay because they would be presented through the testimony of Clum and Biegaj. The court admitted those statements, however, under MRE 613 and MRE 801(d)(2). Again, the parties stipulated to abide by this evidentiary ruling at the second trial.

Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. The evidence regarding Chrisman's termination was relevant

but not for the particular reason cited by the trial court. As noted by plaintiff's counsel in closing argument, "The Chrisman incident was a cause celeb, a major event in the maintenance department. And it did have an effect on what happened in the - - after it." Following Chrisman's termination, Middaugh stated on several occasions that DeMyers "liked to play the race card." This revelation was integral to establishing Middaugh's mindset when he presented his email report to Vilona and Dooling. Absent evidence of Chrisman's termination, Middaugh's statement appears to have occurred in a vacuum and makes little sense. Evidence that Middaugh told Clum that he was terminated because he is white and DeMyers is black is equally relevant to establish Middaugh's state of mind when he prepared his written report.

Middaugh's statements to Clum and Biegaj that Clum was terminated because he is white and DeMyers is black and that DeMyers liked to play the race card were not hearsay because these statements were not presented to prove the truth of the matters asserted. See MRE 801(c). They were statements of belief by Middaugh, presented to establish his mindset. The statements were not presented to prove that the ultimate decisionmakers terminated Clum because he is Caucasian. Therefore, the trial court was not required to rely upon the exclusions to the hearsay definition found in MRE 801(d).[7]

JNL also contends that even if Middaugh's statements and Chrisman's termination are not hearsay and are relevant, the prejudicial effect of the evidence outweighs the probative value, requiring exclusion. MRE 403 provides, "Although relevant, evidence may be excluded if the probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of delay, waste of time, or needless presentation of cumulative evidence." "'Unfair prejudice' does not mean 'damaging'; any relevant evidence will be damaging to some extent. Rather, unfair prejudice exists when marginally relevant evidence might be given undue or preemptive weight by the jury or when it would be inequitable to allow use of such evidence." *Haberkorn v Chrysler Corp*, 210 Mich App 354, 362; 533 NW2d 373 (1995).

> In determining admissability [sic] the court must balance many factors including: the time necessary for presenting the evidence and the potential for delay; how directly it tends to prove the fact in support of which it is offered; whether it would be a needless presentation of cumulative evidence; how important or trivial the fact sought to be proved is; the potential for confusion of the issues or misleading the jury; and whether the fact sought to be proved can be proved in another way involving fewer harmful collateral effects. [*People v Oliphant*, 399 Mich 472, 490; 250 NW2d 443 (1976).]

Neither Chrisman's termination nor Middaugh's statements regarding the reason for Clum's termination were unduly prejudicial. Middaugh's mindset in preparing and presenting his report to Vilona and Dooling was a key issue in this case. Middaugh's report played a major

[7] As Middaugh's statements were not hearsay, it is unnecessary to consider JNL's argument that double-hearsay statements indicating discriminatory animus are inadmissible as direct evidence. See *Jacklyn v Schering-Plough Healthcare Prod Sales Corp*, 176 F3d 921, 926 (CA 6, 1999).

role in the decision-making process. Evidence of Chrisman's termination was necessary to explain why Middaugh might have feared for his own job security in this situation. It was an integral piece of the puzzle in explaining why Middaugh was motivated by race to present a skewed or false report to his supervisors. And Middaugh's after-the-fact assertions that Clum's termination was based on race further evidences Middaugh's mindset. The admission of this vital evidence was not an abuse of discretion.

JNL further argues that evidence of Chrisman's termination should have been excluded as irrelevant "me too" evidence. JNL relies on several federal cases finding irrelevant evidence that other employees, who were not similarly situated to the plaintiff, were treated adversely based on discrimination. In those cases, the evidence was deemed irrelevant to prove that the plaintiff suffered from the same discriminatory animus. *Williams v The Nashville Network*, 132 F3d 1123, 1129-1130 (CA 6, 1997); *Schrand v Fed Pacific Electric Co*, 851 F2d 152, 156 (CA 6, 1988); *Jones v St Jude Med SC, Inc*, 823 F Supp 2d 699, 734-735 (SD OH, 2011). In this case, even if Chrisman and Middaugh were not similarly situated, Chrisman's termination was relevant for a different purpose—to show that Middaugh feared that JNL reacted unfavorably to Caucasian employees involved in disputes with African-American employees.

VII. THIS CASE WAS PROPERLY SENT TO THE JURY

JNL further contends that the trial court should have summarily dismissed Clum's claim or should have entered a directed verdict in its favor. Yet, Clum created a genuine issue of material fact for the jury's review, defeating JNL's directed verdict motions, as correctly determined by the trial court.

And we need not consider whether the trial court erred in denying JNL's summary disposition motion. After a case has been tried to a jury on its merits and "the defendant has done everything that would be required of him if the plaintiff had properly made out a prima facie case, whether the plaintiff really did so is no longer relevant." *US Postal Service Bd of Governors v Aikens*, 460 US 711, 715; 103 S Ct 1478; 75 L Ed 2d 403 (1983). In *Aikens*, the United States Supreme Court explained that after a trial on the merits, a reviewing court must instead focus its inquiry on whether the plaintiff has proven intentional discrimination. *Id*. "But none of this means that trial courts or reviewing courts should treat discrimination differently from other ultimate questions of fact. Nor should they make their inquiry even more difficult by applying legal rules which were devised to govern the allocation of burdens and order of presentation of proof." *Id.* at 716 (quotation marks and citation omitted). Thus, at the close of evidence, "[t]he plaintiff retains the burden of persuasion . . . . [H]e may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Texas Dep't of Community Affairs v Burdine*, 450 US 248, 256; 101 S Ct 1089; 67 L Ed 2d 207 (1981). Alternatively stated, "[t]he issue of whether plaintiff established a prima facie case is subsumed on appeal into whether the plaintiff has sustained his or her ultimate burden." *Bruno v W B Saunders Co*, 882 F2d 760, 764 (CA 3, 1989), quoting *Dreyer v Arco Chem Co*, 801 F2d 651, 654 (CA 3, 1986).

On appeal, Clum argues that Middaugh's statements can be imputed to the JNL decisionmakers as direct evidence of racial discrimination. Clum relies on *Harrison*, 225 Mich

App 601, in this regard. We find the similarities between the current case and *Harrison* attenuated at best.

In *Harrison*, the plaintiff, an African-American woman who had been working for the defendant as a temporary legal secretary, applied for a permanent position. *Id.* at 603. During her first interview, the plaintiff met with two staff attorneys between whom she had previously overheard a conversation relating that she "was a good secretary" but "was the wrong color." *Id.* at 604. Despite this earlier remark, the staff attorneys recommended the plaintiff for a second interview. During the second interview, the plaintiff met with the defendant's corporate counsel and its personnel director. The plaintiff claimed that as she left the interview, "she overheard [the personnel director] tell [the attorney] that he should not permit plaintiff to address him by his first name because plaintiff was black." *Id.* Although the defendant claimed that the corporate counsel "was 'the' decisionmaker," *id.* at 608 n 7, the other interviewers clearly had a direct and integral role in the hiring process.

In the current case, although Middaugh had the power to present his report to upper management in a manner to influence the decision, Middaugh did not have the power to participate in deciding to terminate Clum's employment. Middaugh was more like a witness and acting as a witness in an investigation is clearly distinguishable from participating in an interview selection process. The connection is not strong enough to impute Middaugh's statements to Vilona, Dooling, and Raak or JNL generally as direct evidence of discrimination.

But Clum did present sufficient indirect evidence to create a triable question of fact whether his termination was the result of unlawful discrimination. Stated differently, Clum presented evidence from which the jury could infer that his termination was motivated by unlawful discrimination, *Hazle*, 464 Mich at 462; *Lytle II*, 458 Mich at 173, or that he was treated disparately from a similarly situated coworker based at least in part on race, *Town*, 455 Mich at 695. To establish that two employees are similarly situated, a plaintiff must show that "'all of the relevant aspects' of his employment were 'nearly identical' to those of" the other employee. *Id.* at 700.

> [T]o be deemed "similarly-situated" in the disciplinary context, "the individuals with whom the plaintiff seeks to compare his/her treatment must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." [*Ercegovich*, 154 F3d at 352, quoting *Mitchell v Toledo Hosp*, 964 F2d 577, 583 (CA 6, 1992).]

Although the jury should not be instructed regarding the application of the *McDonnell Douglas* shifting-burdens approach, *Hazle*, 464 Mich at 467, if there remains a question of fact regarding the similarity between two individuals, the issue must be presented to the jury. See *Coleman v Donahoe*, 667 F3d 835, 846-847 (CA 7, 2012).

Clum and DeMyers held the same job title and worked under a single chain of command. Both employees were expected to abide by the rules detailed in the employee handbook. Viewing the evidence in the light most favorable to Clum, DeMyers "engaged in the same

conduct" as Clum. In 2007, DeMyers invited Clum to "get froggy," a slang term for fighting. During the October 2009 incident, DeMyers stared down Clum, hovered over him menacingly, and asked him in a hostile manner, "You got a problem?" JNL officials admitted at trial that DeMyers' conduct could be deemed "threatening" as contemplated in the employee handbook.

JNL contends that the lack of corroboration for DeMyers' conduct at the time of the employment decision is a "differentiating or mitigating circumstance[]," negating the similarity between Clum and DeMyers. Viewing the evidence in Clum's favor, this argument fails. Dooling testified that he interviewed Clark and Middaugh following the 2007 "get froggy" incident, but neither man had witnessed this part of the encounter. Unlike the 2009 investigation, however, Dooling made no written record to support his claim. In relation to the October 2009 incident, Vilona, Dooling and Raak spoke to Clum who denied making a threatening remark and indicated that DeMyers stood over him and asked, "You got a problem?" Dooling alone spoke to DeWitt, who tuned out the conversation and so did not hear Clum's alleged threat. DeWitt did report that DeMyers verbally attacked Clum on October 21 and was "angry" when he asked Clum, "You got a problem?" on October 22. DeMyers and Middaugh each inculpated Clum. But Clum successfully challenged Middaugh's veracity at trial when Middaugh admitted that he did not witness the October 21 events described in his email report and that he falsely asserted that Clum started the "hard stairdown [sic]" with DeMyers. Plaintiff's counsel also got Middaugh to admit that he lied under oath when he tried to disavow any knowledge that Chrisman was fired for making a racist remark. JNL decided not to interview Biegaj, who testified at trial that Clum did not threaten DeMyers and supported that DeMyers' conduct was hostile. From this evidence, the jury could infer that the employees were similarly situated and JNL's incomplete investigation and Middaugh's falsehoods caused any lack of corroboration for Clum's claims against DeMyers.

The jury could have inferred wrongful discrimination from JNL's disparate treatment of Clum and DeMyers alone. Over Clum's tenure, he received one written disciplinary action early on regarding misuse of company email. He received an additional write-up, along with every other member of the maintenance department, regarding a flood incident in the building. DeMyers, on the other hand, received multiple disciplinary actions for tardiness and failure to respond to radio calls. Their coworkers and supervisors described Clum as good natured and hard working. Although some witnesses described DeMyers as a "good" worker, most testified that he was "consistently" or "frequently" late, yelled at his coworkers, was "surly" and often accused others of racism. Despite DeMyers' record of ongoing problems at work, JNL maintained his employment even after the 2007 "get froggy" incident and his menacing behavior toward Clum during the October 2009 events. The jury could infer that JNL gave preferential treatment to DeMyers in the face of equally or more damaging facts supporting termination.

In the alternative, the jury could have inferred that Middaugh, driven by race-based concerns to save his own job, tainted JNL's investigation. Following Chrisman's termination, Middaugh repeatedly told coworkers that DeMyers "liked to play the race card." He twice stated his belief that Clum's termination was based on race and out of JNL's fear that DeMyers would "play the race card." At trial, Middaugh admitted that his email report was misleading, omitted relevant facts, and included false information. Raak, Vilona, and Dooling indicated that Middaugh's report played a major role in their decision. The jury could infer from the totality of

the circumstances that Middaugh was motivated by race to present his report, knowing the effect it would have on the managers, thereby causing Clum's wrongful termination.

JNL complains that Clum failed to present any evidence that, even if Middaugh provided a false or skewed report, Middaugh intended Clum's termination.

> Intent need not be proven by direct evidence, but can be inferred from the totality of the circumstances. Frequently, the most probative evidence of intent will be objective evidence of what actually happened rather than evidence describing the subjective state of mind of the actor. For normally the actor is presumed to have intended the natural consequences of his deeds. [*Cipri v Bellingham Frozen Foods, Inc*, 235 Mich App 1, 12; 596 NW2d 620 (1999) (quotation marks and citation omitted).]

Evidence that Middaugh had expressed his concern about DeMyers playing the race card and that DeMyers had to "push" him into filing the report that implicated Clum was sufficient for the jury to infer that Middaugh intended some negative consequence to Clum in filing his report. Middaugh's statements following Clum's termination that the decision was based on race was further evidence that Middaugh's actions were discriminatory in nature. It is irrelevant that Middaugh did not actually hold a racial animus toward Caucasian individuals; his conduct was motivated by a distinction based on race.

Affirmed. Plaintiff Clum, as the successful party, may tax costs pursuant to MCR 7.219.

/s/ Donald S. Owens
/s/ Elizabeth L. Gleicher
/s/ Cynthia Diane Stephens